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No. 80-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD L. HUDSON, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

and

THOMAS V. CONNOLLY, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

November 7, 1980

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Counter-Statement of the Questions Presented

1. Where a plaintiff in a non-class "disparate treatment" action offered statistical evidence regarding defendant-employer's work force in order to bolster his case and those statistics were received in evidence but did not cure plaintiff's failure to show the availability of a higher position to which he could be promoted, should certiorari be granted on the question whether statistics alone can establish a *prima facie* disparate treatment case brought pursuant to 42 U.S.C. § 1981?

2. Where (a) the trial court permitted plaintiff to offer evidence of retaliation as part of his discrimination claim, (b) both courts below ruled that plaintiff failed to prove any acts of retaliation, and (c) the Court of Appeals therefore did not find it necessary to pass on the question whether a retaliation claim unrelated to race can be based on the 1866 Civil Rights Act, should this Court grant certiorari to decide that question when any decision would not change the outcome of the trial?

3. Where the trial judge received plaintiff's evidence of an alleged disparate impact but rejected it as overbroad and inconclusive, and further held that under standards of both intentional and non-intentional discrimination plaintiff failed to establish his case, should this Court grant certiorari in a disparate treatment action to decide whether intent must be established in a disparate impact action brought pursuant to 42 U.S.C. § 1981, an academic question that cannot affect the decision below?

INDEX

PAGE

STATUTORY PROVISION INVOLVED 1

COUNTER-STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 4

I. Petitioner's Statistics on Racial Composition Received in Evidence Were Offered Solely to Bolster His Disparate Treatment Case, and the Court of Appeals' Ruling Regarding Those Statistics Does Not Conflict with the Authorities Cited by Petitioner 5

II. In Affirming the Trial Court's Finding That Petitioner Failed to Establish Any Acts of Alleged Retaliation, the Court of Appeals Did Not Find It Necessary to Decide Whether a Black Plaintiff Could Maintain a Retaliation Claim Unrelated to Race Discrimination under 42 U.S.C. Section 1981 10

III. Since the Trial Court Held Petitioner's "Disparate Impact" Evidence Insufficient and Further Held He Failed to Prove His Case under a Standard of *Non*-intentional Conduct, the Issue of Intent to Discriminate in a Section 1981 Disparate Impact Action Is Merely Academic 13

CONCLUSION 15

TABLE OF AUTHORITIES

PAGE

Cases:

Aetna Life Ins. Co. of Hartford, Conn. v. *Haworth*, 300 U.S. 227 (1937) 11

Bell v. *Maryland*, 378 U.S. 226 (1964) 11

Berenyi v. *District Director, INS*, 385 U.S. 630 (1967) 12

Campbell v. *Gadsden County Dist. School Bd.*, 534 F.2d 650 (5th Cir. 1976) 10

Castaneda v. *Partida*, 430 U.S. 482 (1977) 13

Cubas v. *Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) 12

Davis v. *Califano*, 613 F.2d 957 (D.C. Cir. 1979) .. 7, 8

DeMatteis v. *Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975) 12

Flowers v. *Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977) 5

Furnco Constr. Corp. v. *Waters*, 438 U.S. 567 (1978) 5, 6

Garcia v. *Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254 (N.D. Ill. 1978) 12

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949) 12

Hazelwood School District v. *United States*, 433 U.S. 299 (1977) 9

Hudson v. *International Business Machines Corporation*, 9 EPD ¶ 9991 [CCH] (S.D.N.Y. 1975) 2

International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42 (1979) 12

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 9, 13

Jones v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970) 8

King v. *Yellow Freight System, Inc.*, 523 F.2d 879 (8th Cir. 1975) 9

Local No. 8-6, Oil, Chemical and Atomic Workers v. *Missouri*, 361 U.S. 363 (1960) 14

	PAGE
Long v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974)	5
Mayor of Philadelphia v. *Educational Equality League*, 415 U.S. 605 (1974)	9
McDonald v. *Sante Fe Trail Transporation Co.*, 427 U.S. 273 (1976)	10
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	5, 6
Morita v. *Southern California Permanente Medical Group*, 541 F.2d 217 (9th Cir. 1976)	9
Naraine v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974)	9
Patterson v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976)	10
Preiser v. *Newkirk*, 422 U.S. 395 (1975)	14
Ragheb v. *Blue Cross and Blue Shield of Michigan*, 467 F. Supp. 94 (E.D. Mich. 1979)	12
Reed v. *Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973)	8
Runyon v. *McCrary*, 427 U.S. 160 (1976)	10
Sabol v. *Snyder*, 524 F.2d 1009 (10th Cir. 1975)	5
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969)	12
Tramble v. *Converters Ink Co.*, 343 F. Supp. 1350 (N.D. Ill. 1972)	10, 11
Turner v. *Fouche*, 396 U.S. 346 (1970)	9
United States v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971)	9
Washington v. *Davis*, 426 U.S. 229 (1975)	3, 14
Winston v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977)	12
Statutes:	
Civil Rights Act of 1866, 42 U.S.C. § 1981	*passim*
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*	2, 5, 8

IN THE

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RICHARD L. HUDSON,

Petitioner,

—against—

INTERNATIONAL BUSINESS MACHINES CORPORATION and THOMAS V. CONNOLLY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Statutory Provision Involved

The following statutory provision is involved:

The Civil Rights Act of 1866, c. 31, 14 Stat. 27, codified in 42 U.S.C. § 1981 (1966 ed.):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

Counter-Statement of the Case

This action was brought by petitioner* against his employer International Business Machines Corporation ("IBM") and his manager at IBM from May 1969 to February 1971. Petitioner claimed that IBM and the manager had not promoted him beyond the first professional level in 1970 because he was black. Petitioner also contended

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* Petitioner joined IBM in 1963 at a low "non-professional" position level after receiving a technical school diploma. By December 1973 when this action was commenced he had reached the fourth "professional" level. By the time of the trial, he had achieved the sixth professional level and was earning seven times his initial salary.

that respondents had retaliated against him because he had resorted to internal employee grievance procedures and had commenced unsuccessful administrative proceedings before the New York State Division of Human Rights. Petitioner alleged only these individual claims of disparate treatment and retaliation in the complaint; there were no claims as to any class of employees or allegations as to any disparate impact of any of IBM's personnel practices.

Although the complaint alleged that the claimed discrimination and retaliation violated Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981, the District Court narrowed the scope of the action prior to trial. First, the court dismissed petitioner's Title VII claim since he had not commenced the action within 90 days of receiving a notice of right to sue. Petitioner continued the action on the basis of Section 1981. In a subsequent ruling, the District Court held that petitioner could not base his retaliation claim on that statute since he did not allege any racial motivation, the essential element of a Section 1981 claim. *Hudson* v. *International Business Machines Corporation*, 9 EPD ¶ 9991 [CCH] (S.D.N.Y. 1975). This ruling did not remove a single allegation from the complaint; the court gave petitioner free rein to offer whatever evidence he wished of alleged retaliation to prove racial discrimination. Judge Tyler specifically stated on that issue:

> I . . . rule that plaintiff cannot make out a separate claim of retaliation [under Section 1981]. Nonetheless, at this stage prior to trial, I am reluctant to strike the [retaliation] allegations contained in paragraph 10 [of the complaint] in light of the possibility, however remote, that plaintiff might be able to prove retaliation as some evidence of his basic discrimination claim under Section 1981. [A-17*]

As petitioner's recital of his view of the evidence demonstrates (Petition at 12-13), petitioner fully availed himself of

* Citations in the form "A-. ." refer to the pages in the Appendix to the Petition.

the opportunity Judge Tyler gave him to present evidence regarding the supposed retaliation.

During the five-day bench trial before Judge Carter, in addition to the testimony of eight witnesses and dozens of documents, petitioner offered certain statistics as evidence. He offered numbers regarding the black employees at various position levels for the single year 1970 at the facility where he was employed under respondent Connolly. ***These figures were admitted into evidence.*** Petitioner also offered in support of his new-found "discriminatory impact" theory* four numbers from an internal IBM study showing the gross percentage distribution of appraisal (or employee performance) ratings among all black and white employees of IBM nationwide. Although the figures did not differentiate between the levels of the employees listed, or whether they were professional or non-professional employees, or the length of their employment at IBM, and did not make any other relevant distinctions, ***they too were admitted into evidence.*** Judge Carter found, however, that these overbroad figures were not sufficiently meaningful to allow any inferences regarding IBM's appraisal process (A-12 - A-13).

After both sides rested, and with the evidence, arguments and witnesses' demeanor fresh in mind, Judge Carter dictated his findings and conclusions into the record. He held that petitioner failed to prove any of his contentions as to discrimination and retaliation (A-7 - A-15). Relying on this Court's 1975 decision in *Washington* v. *Davis*, 426 U.S. 229 (1975), Judge Carter rejected petitioner's argument that it was not necessary for a plaintiff in an individual, non-class disparate treatment action brought under 42 U.S.C. § 1981 to prove intentional discrimination. Nonetheless, giving petitioner all benefit of the doubt, Judge Carter further held that even if petitioner was *not* required to show intentional discrimination, his proof as to his entire case, garnered during five years of preparation, was simply insufficient.

* This claim does not appear in the complaint.

The Court of Appeals, after thoroughly reviewing the record and summarizing both the prior proceedings and the evidence, unanimously affirmed the dismissal:

> We conclude that the record amply supports Judge Carter's finding that the plaintiff failed to prove that he was discriminated against as to promotions, transfers, or assignments because he was black. . . . Hudson failed to establish any acts of retaliation. [A-5, A-6]

Reasons Why the Petition Should Be Denied

Petitioner had a full and fair opportunity to prepare his claims during more than five years of pre-trial discovery and he was given great latitude to present his case in the manner he thought best during a five-day trial. The court received the statistical and other evidence petitioner sought to introduce and which he summarizes in his petition, and then weighed that evidence under standards of both intentional and non-intentional discrimination. Both the trial and appellate courts held petitioner did not prove his case.

The purported "issues" petitioner now presents cannot alter that unanimous determination. Even if statistics could establish a *prima facie* case in an individual disparate treatment action such as this, petitioner's statistics regarding respondent's work force at one facility would not cure the gaps in his case regarding his qualifications and available positions. Even if a claim for non-racially motivated retaliation could be maintained under 42 U.S.C. § 1981, that would not change the Court of Appeals' holding on review of the entire record that "Hudson failed to establish any acts of retaliation" (A-6). And even if petitioner had asserted a true disparate impact claim and a non-intentional standard applied to such a claim under Section 1981, his evidence was found to be insufficient by the trial court. Further, the alleged conflicts among the circuits, which petitioner claims warrant this Court's review, do not exist. Even if they did, resolution of every one in his favor would not alter the outcome below. A writ of certiorari should not be granted for

the purpose of rendering nothing more than an advisory opinion that would not affect this petitioner's rights.

POINT I

Petitioner's Statistics on Racial Composition Received in Evidence Were Offered Solely to Bolster His Disparate Treatment Case, and the Court of Appeals' Ruling Regarding Those Statistics Does Not Conflict with the Authorities Cited by Petitioner.

Petitioner did not offer statistics as to the racial composition of the work force at the facility where he was located to establish any element of his *prima facie* disparate treatment claim that he was not promoted because he was black. Hence, he errs in pointing to three decisions of the Courts of Appeals for the District of Columbia, the Ninth and the Tenth Circuits in an attempt to find a conflict among the circuits he hopes will justify granting a writ of certiorari. Not one of the decisions cited conflicts with the holding in this action, for each dealt with the use of statistical proof to establish a *prima facie* case, and not, as here, merely to bolster plaintiff's claim.

This action was an individual, non-class action in which petitioner alleged a classic "disparate treatment" claim, namely, that he was not promoted to a higher level for the simple reason of his race. It was therefore incumbent on him, in accordance with decisions of this Court, to make out a *prima facie* case of discrimination specifically against him. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court suggested four elements which, if proven, would establish such a case:

> The complainant in a Title VII[*] trial must carry the initial burden under the statute of establishing a

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* The Court of Appeals below held the "McDonnell Douglas criteria" were applicable to actions brought under Section 1981, citing *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977); *Sabol* v. *Snyder*, 524 F.2d 1009 (10th Cir. 1975); and *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974) [A-3d].

> *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802.

In *McDonnell Douglas*, this Court further explained that after the plaintiff proved his qualifications for an open position, statistics as to the employer's "policy and practice may be helpful," 411 U.S. at 805, as part of plaintiff's *rebuttal* of the employer's defense that the employee was not qualified. In other words, this Court held in *McDonnell Douglas* that such statistics may bolster plaintiff's *prima facie* case, but not establish it. In *Furnco*, this Court pointedly illustrated the secondary role of statistics in an individual disparate treatment action by stating that statistics showing a racially *balanced* work force would not "immunize an employer from liability for specific acts of discrimination." 438 U.S. at 579 (emphasis added).

The Court of Appeals recognized that petitioner failed to establish after a full trial one of the essential elements of his case, namely, that there were positions to which he could be promoted (A-3d—A-4). The statistics regarding all of the other black employees at the facility where petitioner worked, which Judge Carter admitted into evidence, did not—and could not—fill this gap in petitioner's proof. The Court of Appeals clearly saw this fatal flaw when it held that "Hudson has failed to establish his case and the statistics standing alone *do* not create it" (A-6, emphasis added). The Second Circuit's statement (A-5) that Judge Carter did not err in holding that the statistics proffered by petitioner "would not establish a prima facie case [but] could be used to bolster" his claim, was surely a correct comment on the applicable law, but it was irrelevant to the dispositive fact that petitioner's evidence simply was inadequate.

Significantly, petitioner's attorney admitted in his summation that the work force statistics he now relies on would be insufficient alone to prove his *prima facie* case. Referring to the number of black professionals at petitioner's facility he stated:

> *We are not claiming that [these] statistics alone would be enough to sustain a finding of racial discrimination in this case.* But what we are saying is that the case law supports the proposition that statistics, in combination with other evidence, are sufficient. [Appendix on Appeal at A1295, Trial Transcript at 1092, emphasis added.]

Further confirming that the work force statistics were not offered to prove any of the elements of his *prima facie* case, petitioner now claims (Petition at 7) they showed that his alleged "problems" in obtaining advancement were supposedly "common to all black employees" at his place of employment. In other words, the numbers were admittedly offered merely to lend credence to petitioner's allegations that he had been treated differently as to his promotions because he was black or to cast doubt on IBM's defense, that is, they were intended to bolster his case. Petitioner's implicit argument before this Court that his case stood or fell on the weight given his statistics is therefore absurd. This Court should not grant certiorari to decide whether statistics alone can establish a *prima facie* case of individual disparate treatment, as petitioner urges, when those statistics were not even offered for that purpose at trial.

Petitioner tries in vain to find a conflict among the circuits by citing three of the Court of Appeals decisions that he already relied on unsuccessfully before the Second Circuit. Only a brief analysis of those decisions is necessary to demonstrate that a conflict does not exist and that the Second Circuit's decision was in all respects correct.

Davis v. *Califano*, 613 F.2d 957 (D.C. Cir. 1979), was an individual action brought pursuant to Title VII in which plaintiff claimed sex discrimination in promotions. The sole issue on appeal centered not on whether all of the evidence

elicited during both sides' direct and rebuttal cases supported the dismissal of the complaint, but whether the District Court erred on the precise point of law that statistical evidence "alone may not prove a *prima facie* case in an individual, as opposed to a class action, discrimination case." 613 F.2d at 961. The District of Columbia panel reversed on this single, narrow issue, notwithstanding the fact that a full trial had been had, and remanded for further consideration of that one issue. Unlike the ruling in *Davis* v. *Califano*, the Second Circuit's statement below as to petitioner's statistics did not result in petitioner's losing the day, but was a determination that petitioner's statistics did not fill one of the voids in his case.

Davis v. *Califano* can be further distinguished by examining the key role the statistics played in that plaintiff's *prima facie* case. In contrast to petitioner's burden of proof in this action, Ms. Davis was not required to establish her particular qualifications for the position sought or that openings existed for her since "there [were] no minimum necessary objective qualifications" for the position she thought she deserved. 613 F.2d at 964. Hence, Ms. Davis was arguing in effect that some neutrally-applied standard had a disparate impact on a group (women employees) of which she was a member. It is well-settled that statistics alone can establish a *prima facie* disparate impact or pattern-and-practice case. *See, e.g., Reed* v. *Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973). This action was not such a case.

The decision from the Tenth Circuit which petitioner characterizes as conflicting, *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), was an individual disparate *impact* case. There, four black plaintiffs challenged under Title VII a "no transfer" policy regarding two classes of truckdrivers. There was "no claim that the policy ha[d] been unfairly or discriminately applied," 431 F.2d at 247 (the classic disparate treatment claim); rather, plaintiffs alleged the policy was "superficially neutral" as applied. *Id.* This, plus the "business necessity" defense asserted, are the hallmarks of a disparate impact case where the role of statistics is markedly different.

The final decision petitioner cites is *Morita* v. *Southern California Permanente Medical Group*, 541 F.2d 217 (9th Cir. 1976). In affirming the dismissal of the individual plaintiff's complaint for failure to prove his qualifications for promotion, the court there simply recited, at page 219, "This Circuit has recognized that disparities in the numbers of minority . . . employees *may* establish the plaintiff's *prima facie* case," and cited its decision in *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The latter case itself was a class-type "pattern-and-practice" action against five unions by the federal government on behalf of black construction workers primarily charging that the union's admission criteria had a "differential impact". Hence, petitioner's reliance on *Morita* is misplaced.*

There is not any conflict between the Second Circuit's decision in this action and the decisions petitioner cites for the simple reason petitioner offered the statistics to bolster an otherwise unproven claim. Accordingly, the writ should not be granted.

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* None of the other decisions petitioner lists (Petition at 8-9) lends support to his arguments. In *King* v. *Yellow Freight System, Inc.*, 523 F.2d 879, 882 (8th Cir. 1975), the court affirmed dismissal of the complaint, noting that while "[s]tatistics may be used to prove a . . . class action," they are "not determinative of an employer's reason for the action taken against the individual grievant." In *Naraine* v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974), plaintiff failed to prove his individual case and statistics regarding the employer's policy were not considered. *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), were government "pattern-and-practice" cases, not individual actions. *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 (1974), was an action by a nonprofit group on behalf of all citizens of Philadelphia where the issue was the proper method of using and interpreting statistics in deciding whether the racial composition of a school board mirrored the population. *Turner* v. *Fouche*, 396 U.S. 346 (1970), was a class action not even relating to employment discrimination.

POINT II

In Affirming the Trial Court's Finding That Petitioner Failed to Establish Any Acts of Alleged Retaliation, the Court of Appeals Did Not Find It Necessary to Decide Whether a Black Plaintiff Could Maintain a Retaliation Claim Unrelated to Race Discrimination under 42 U.S.C. Section 1981.

Petitioner's evidence below failed to establish any of the retaliatory acts alleged in the complaint. The Second Circuit therefore specifically declined to decide the issue petitioner now raises concerning the nature of a retaliation claim under Section 1981. It is self-evident that this Court should not grant certiorari where the appellate decision below does not contain any holding on a particular question of law, let alone one that conflicts with decisions in other circuits.

The complaint alleged petitioner was retaliated against not because he was black, but because he had commenced grievance proceedings within IBM and before a state administrative agency. Respondents moved the District Court to dismiss petitioner's retaliation claim on the ground that Section 1981 provided a court-created remedy for racially-motivated acts, but the retaliation petitioner alleged was admittedly not motivated by "racially-based animus." The District Court, relying on the reasoning of *Tramble* v. *Converters Ink Co.*, 343 F. Supp. 1350 (N.D. Ill. 1972), ruled that petitioner could not "make out a *separate* claim of retaliation" (A-17, emphasis added) under Section 1981.* It did not, however, strike a single allegation of the complaint and authorized petitioner to use any evidence of alleged retaliation to prove his "basic discrimination claim" (A-17).

* The *Tramble* decision is in accord with decisions of this Court and Courts of Appeals. *See, e.g., McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 295 (1976); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Campbell* v. *Gadsden County Dist. School Bd.*, 534 F.2d 650 (5th Cir. 1976).

Despite petitioner's urging on appeal, the Second Circuit found it unnecessary to decide whether the District Court erred in following the *Tramble* case. The Court stated:

> . . . Judge Tyler dismissed the retaliation aspects of Hudson's complaint. . . . In any event, Judge Tyler did not strike the allegations of retaliation from the complaint in view of the possibility that the plaintiff might be able to prove retaliation as some evidence of his basic discrimination claim under Section 1981. ***Whether or not Tramble, upon which Judge Tyler relied, is sound, the point is that Hudson failed to establish any acts of retaliation.*** [A-6, emphasis added.]

Plainly, a writ of certiorari is not warranted where the Court of Appeals did not address the issue presented in the petition, and more important, where the evidence shows that a resolution of a point of law in petitioner's favor would not have made any difference to the outcome of the trial. Granting the petition would be tantamount to agreeing to give "an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 241 (1937). *Cf. Bell* v. *Maryland*, 378 U.S. 226, 237 (1964) (This Court does not decide questions "not necessarily presented for decision. Such a course would be inconsistent with our constitutional inability to render advisory opinions.").

Petitioner insists before this Court, however, that his interpretation of the evidence he presented at trial—which was reviewed (and rejected) by the Second Circuit on appeal of this very same issue—supports his allegations as pleaded (Petition 11-13). Petitioner's version of the evidence, however, merely summarizes his own self-serving testimony and hearsay; it ignores the damaging admissions elicited from petitioner and his witnesses on cross-examination and the unrefuted facts established during respondents' defensive case. Both the trial and appellate courts had before them the *entire* record, and both courts arrived at the same conclusion, without dissent.

It is not the function of a writ of certiorari to present to this Court for *de novo* review findings of contested facts made

after trial and unanimously affirmed on appeal. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 46 n. 7 (1979); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.")

> The policy underlying the "two-court" rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. *Berenyi* v. *District Director, INS*, 385 U.S. 630, 636 (1967).

Petitioner does not offer any justification for departing from this long-standing and compelling rule.* A writ of certiorari should not be granted as to the retaliation claims, which remained merely "claims," never established.

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* Even assuming *arguendo* that the District Court's ruling on the scope of Section 1981 in this action adversely affected petitioner and that the Second Circuit impliedly affirmed that ruling, petitioner has failed to show the necessary conflict among the circuits. None of the cases he cites (Petition at 10-11) involved a claim of retaliation asserted by a black plaintiff or the precise issue whether alleged retaliation for seeking legal redress gives rise to a claim under Section 1981. Rather, they involved the issues (a) whether a non-black who has been discriminated against because he helped blacks who were themselves trying to overcome racially-motivated discrimination has the same standing to sue under Section 1981 as do the direct victims of racial hatred (*Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977); *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975)); or (b) whether Section 1981 extends to non-black minorities where the discrimination is racial in character (*Ragheb* v. *Blue Cross and Blue Shield of Michigan*, 467 F. Supp. 94 (E.D. Mich. 1979) (national origin claim involving "racial situations"); *Cubas* v. *Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) and *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254 (N.D. Ill. 1978) (anti-Spanish animus alleged as racial in character)).

POINT III

Since the Trial Court Held Petitioner's "Disparate Impact" Evidence Insufficient and Further Held He Failed to Prove His Case under a Standard of *Non*-Intentional Conduct, the Issue of Intent to Discriminate in a Section 1981 Disparate Impact Action Is Merely Academic.

Petitioner failed at trial to present meaningful evidence of the purported "disparate impact" of an employee rating process at IBM in which each employee's performance in carrying out his assigned responsibilities is judged by his immediate manager.* Disregarding the fact that IBM's more than a quarter-million professional and non-professional level employees perform a multitude of functions and bring to their jobs different degrees of experience, petitioner merely offered four simple across-the-board and nationwide figures. These figures, not even subjected to accepted methods of statistical analysis this Court has indicated are appropriate,** were nonetheless admitted into evidence. The trial judge, however, recognized the complexity of IBM's work force and held the data insufficient to prove anything:

> [T]hat data, standing alone, is not usable for any purpose without some more discrete inquiry as to the level of the employees and who they are and what. [A-12 - A-13.]

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* IBM disputes the contention that "distribution" of appraisal ratings at IBM can be the subject of a disparate impact claim for the simple reason that appraisals are not awarded mechanically. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15 (1977). An employee's appraisal rating is the result of the evaluation by his manager of that employee's sustained performance in a particular job. As a result, the totality of appraisals of all employees is the product of separate and independent judgments by each manager based on the varying requirements of each position and function. Thus, if race discrimination occurs with respect to any appraisal it can only be because a particular manager has rated a black employee lower than his performance warrants *because he is black*. This is the essence of a disparate *treatment* claim. Disparate treatment claims cannot logically be "aggregated" to construct a disparate impact claim.

** *See, e.g., Castaneda* v. *Partida*, 430 U.S. 482, 496 n. 17 (1977).

Judge Carter then held that none of petitioner's evidence proved his claims:

> I don't believe that the plaintiff has established . . . that he was discriminated against because of his race. . . . I make that decision on the basis of the need to show intentional discrimination, which is the standard I understand to be applicable . . . in *Washington* v. *Davis*.
>
> But I must say that *even if the standard [was] not intentional, I don't think that the plaintiff has established it.* [A-13, emphasis added.]

The foregoing record demonstrates that the third and final ground petitioner offers for the writ is an academic non-issue. Whether or not Section 1981 requires a showing of a deliberate intent to discriminate, petitioner's scanty evidence as to the supposed "impact" of IBM's appraisal process was deemed meaningless, and consequently his so-called "discriminatory impact" case failed. Thus, even if this Court decided that Section 1981 supports a claim of non-intentional discrimination, it would not affect the outcome of this litigation. Certiorari is not meant for such academic and moot questions.

> [T]he duty of this Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Mills v. Green, 159 U.S. 651, 653 [citations]. *Local No. 8-6, Oil, Chemical and Atomic Workers* v. *Missouri*, 361 U.S. 363, 367 (1960).

See also Preiser v. *Newkirk*, 422 U.S. 395 (1975).

Because petitioner's failure to present meaningful statistics rendered his impact claims moot, this action is not the appropriate vehicle for deciding the question of the standard of proof under Section 1981 for "disparate impact" claims, and the petition should be denied.

Conclusion

For the foregoing reasons, the petition should be denied.

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Respectfully submitted,

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